

the standard of “substantial evidence of intent to deceive.” The Presiding Judge based his misrepresentation and lack of candor findings on the Affidavit, which included the statement that Kay does not have an “interest” in Sobel’s Stations. However, the Affidavit alone fails to provide the necessary evidence of intent to establish the level of misrepresentation or lack of candor necessary to prompt license revocation.<sup>4</sup> Nothing more was established in the hearing or relied on by the Presiding Judge.

42. It is uncontested that the Affidavit was prepared by Sobel’s attorney. Sobel signed the Affidavit after being told by counsel that the Affidavit complied with all Commission rules (Tr. 263). As for the reference to “interest,” Sobel considered “interest” to mean a co-owner or partnership (Tr. 137, 146-147), and did not consider the Management Agreement to constitute a transfer of control. This is not an inconceivable conclusion on his part.

43. In addition, the Affidavit was not prepared for this proceeding, but rather was prepared so that Sobel’s licenses could be removed from the Kay revocation proceeding (Tr. 154-55). Putting the Affidavit in its proper context, Sobel was not required to provide the Commission with a detailed description of his relationship with Kay and the Management Agreement<sup>5</sup>, and consequently he did not make any intentional misrepresentations to the Commission. Rather, Sobel was merely advising the commission of a matter that all are now in agreement over: that Sobel was not a fictitious name used by Kay.

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<sup>4</sup> Sobel’s good faith reliance on the advice of counsel is relevant in determining whether his alleged misrepresentations were intentional. See, e.g., WEBR, Inc. v. FCC, 420 F.2d 158, 167-68 (D.C. Cir. 1969).

<sup>5</sup> Neither the Bureau nor the Presiding Judge cite any Commission rules or precedent that directs Commission licensees to provide the Commission with copies of management agreements or related documents.

44. There is no evidence in the record of the case that supports that conclusion that Sobel intentionally misrepresented any facts to the Commission. Sobel merely signed the Affidavit in an effort to distinguish his licensees from those held by Kay. While there may be imprecision in the drafting of the document, there has been no showing by the Bureau that either Sobel or his counsel intended to lie or deceive the Commission. “The Commission will not disqualify an applicant. . . for a negligent omission.” Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217 (D.C. Cir. 1994). Since the Bureau has not even proved a “negligent omission,” let alone “substantial evidence of intent to deceive,” all findings in the Initial Decision to the contrary must be reversed and Sobel must be found not to have engaged in any misrepresentation.

**III. Commission Precedent Renders Revocation an Improper Penalty for the Violation the Presiding Judge Found**

45. The Initial Decision provides that the penalty against Sobel for his action is the revocation of Sobel’s licenses. This remedy is not proper under Commission precedent and must be reversed.

46. Forfeiture, rather than revocation of licenses, is the penalty imposed by the Commission for a violation of the Commission’s unauthorized transfer of control rules. See, e.g., Galesburg Broadcasting Co., 69 RR2d 211 (1991) (\$25,000 forfeiture imposed for unauthorized transfer of control); Benito B. Rish, M.D., 69 RR2d 418 (1991) (\$10,000 forfeiture imposed for unauthorized transfer of control); Mountain Signals, Inc., 69 RR2d 563 (1991) (\$10,000 forfeiture imposed for unauthorized transfer of control); Salem Broadcasting, Inc., 69 RR2d 853 (1991) (\$10,000 forfeiture imposed for unauthorized transfer of control); CanXus

Broadcasting Corp., 7 FCC Rcd 3874 (1992) (\$10,000 forfeiture imposed on licensee for its unauthorized assumption of control), reconsideration denied, 8 FCC Rcd 4323 (1993), affd., 10 FCC Rcd 9950 (1995); The Hinton Telephone Co. Of Hinton Okla., Inc., 70 RR2d 393 (1991) (\$7,000 forfeiture imposed for unauthorized transfer of control), modified, 71 RR2d 974 (1992) (forfeiture reduced to \$5,000); Mountain Signals, Inc., 71 RR2d 141 (1992) (\$10,000 forfeiture imposed for unauthorized transfer of control); New West Broadcasting Systems, Inc., 71 RR2d 757 (1992) (\$20,000 forfeiture imposed for unauthorized transfer of control).

47. The Commission may not depart from precedent without clear explanation. Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42, 49 (D.C. Cir. 1994) (citations omitted) (“[t]he Commission may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside”) (emphasis added); National Black Media Coalition v. FCC, 775 F. 2d 342, 355 (D.C. Cir. 1985) (citations omitted) (“it is also a clear tenet of administrative law that if the agency wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction”) (emphasis added). The Presiding Judge has provided no explanation regarding why, even if Sobel has committed the acts he is charged with, that the penalty should be license revocation rather than forfeiture. Given the clear weight of precedent in favor of forfeiture, the Presiding Judge was obligated to distinguish this case from the others decided by the Commission. In the absence of such analysis, revocation is unwarranted and must be reversed in favor of a forfeiture under application of the Commission’s Forfeiture Policy Statement, 12 FCC Rcd 17087 (1997).

**IV. The Presiding Judge Made Findings of Fact and Conclusions of Law That Exceeded the Scope of the Hearing Designation Order**

48. On May 8, 1997, the Presiding Judge, at the Bureau's specific request, added the following issues to the HDO:

- (a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995 (emphasis added).
- (b) To determine, based upon the evidence adduced pursuant to the foregoing issues, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

49. Despite the limited scope of the added issues, in the Initial Decision under the heading of "Misrepresentation/Lack of Candor Issue", the Presiding Judge improperly expanded on the issues designated for hearing by adding three (3) other instances of alleged misrepresentation in addition to the "January 1995 Affidavits": namely (i) Responses to Application Return Notices (§ 76 of the Initial Decision); (ii) the Management Agreement (§ 74 of the Initial Decision)<sup>6</sup>; and (iii) the Stanford Letter (§ 75 of the Initial Decision).

50. Since these findings and conclusions are clearly beyond the scope of the issues designated by the Commission, any findings of fact and conclusions of law, other than those surrounding the "January 1995 Affidavits", should be wholly disregarded and set aside. See, e.g., The Telephone Co., Inc., et. al., 41 RR2d 611, 616-617 (1977) (certain findings and conclusions set aside since they were "beyond the scope of the issues in this proceeding.").

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<sup>6</sup> To the extent the Management Agreement is considered in the context of the Misrepresentation/Lack of Candor Issue, Kay produced the Management Agreement (as well as other management agreements that Kay is a party to) to the Bureau in March 1995 in his own case, James A. Kay, Jr., WT Docket No. 94-147.

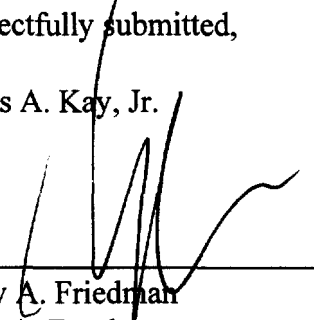
## V. CONCLUSION

51. After full consideration of the trial testimony, the arguments presented by both Sobel and Kay, and the Initial Decision, it is clear that there is an insufficient basis for the denial of applications designated for hearing and the revocation of the licenses held by Marc Sobel or Marc Sobel d/b/a Air Wave Communications. Therefore, the Initial Decision must be reversed and Marc Sobel's entitlement to be a Commission licensee must be affirmed.

WHEREFORE, James A. Kay, Jr. respectfully requests the Commission reverse the Initial Decision of Administrative Law Judge John M. Frysiak; that the Commission make findings and conclusions based on the record in the proceeding; that all issues be resolved in favor of Marc D. Sobel and Marc D. Sobel d/b/a Airwave Communications; and that all pending applications and filings of Marc D. Sobel and/or Marc D. Sobel d/b/a Airwave Communications be processed immediately.

Respectfully submitted,

James A. Kay, Jr.



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Dated: January 12, 1998

## **CERTIFICATE OF SERVICE**

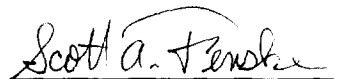
I hereby certify that a true and correct copy of the foregoing James A. Kay, Jr.'s Exceptions to the Initial Decision of John M. Frysiak was sent via first-class mail on this 12<sup>th</sup> day of January, 1998, to the following:

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